87-1459

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Case #_____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

In the Matter of

HARRY TOUSSAINT ALEXANDER,

A Member of the Bar
of the United States
District Court for the
District of Columbia

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) Under Selling v Radford, 243 US 46, 37 SCt 377 (1917), must a respondent attorney show no proof at all establishing misconduct according to "contradictory findings" of a state court to satisfy the "infirmity of proof" condition for avoiding reciprocal discipline?

(2) Under Selling v Radford, may a federal court impose reciprocal discipline on proof of violations of disciplinary rules construed in a "broad sense" of undefined terms?

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OPINION BELOW

The text of the unpublished November 30, 1987 opinion of the United States Court of Appeals for the District of Columbia Circuit in Case #86-5299 is reproduced and appended to this petition.

JURISDICTION

Jurisdiction is based on 28 US Code 1254(1) for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the

JURISDICTION

(continued)

reciprocal disciplinary order of the United States District Court for the District of Columbia in Case #AGD 85-11.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

"No person shall be ... deprived of life, liberty, or property without due process of law," Amendment 5, United States Constitution.

"A lawyer shall not engage in conduct prejudicial to the administration of justice," Disciplinary Rule 1-102(A)(5), District of Columbia Code of Professional Responsibility.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

The license to practice law in the District of Columbia is a continuing proclamation by the court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and as an officer of the court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the Bar as conditions for the privilege to practice law.

Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the Code of Professional Responsibility as from time to

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

time is in effect in the District of Columbia, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

Conviction of a crime shall similarly be grounds for discipline as set forth in Sec. 15 of this rule," District of Columbia Bar, Rule XI(2).

"Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, this Court, except as otherwise provided for below, shall impose the identical discipline, unless the respondent attorney demonstrates, or this court finds, that upon the face of the record on which the

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

discipline in another jurisdiction is predicated it clearly appears:

(1) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) That the proof establishing the misconduct gives rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion of the disciplining court; or

(3) That the imposition of the same discipline by this Court would result in grave injustice; or

(4) That the misconduct established is deemed by this Court to warrant substantially different discipline.

When this court determines that any of

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

the above elements exist, it shall enter an order it deemd appropriate," Local Rule 4-3(II)(d), United States District Court for the District of Columbia.

SUPREME COURT OF THE UNITED STATES

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In the Matter of

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PETITION FOR WRIT OF CERTIORARI TO
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STATEMENT OF THE CASE

When petitioner, a former Assistant United States Attorney, Special Assistant to an Attorney General, First Assistant United States Attorney, and District of Columbia trial judge, was suspended from the practice of law in the District of Columbia in disciplinary proceedings reported as Matter of Alexander, 496 A.2d 244 (D.C. 1985), the United States District Court for the District of Columbia

instituted reciprocal disciplinary under its then local Rule 4-3(II), ordering petitioner to show cause of any claim that the imposition of identical discipline would be unwarranted.

The state court argued in its opinion that its disciplinary proceedings were fair because it sustained only 12 of the 22 charges it brought against petitioner, 496 A.2d at 245. Most aggravating of the 12, according to the state court, were "five instances of violating DR1-102(A)(5) (conduct prejudicial to the administration of justice)," 496 A.2d at 261, which the state court construed in "the broad sense ... as found in D.C. App. R. XI, Section 2," 496 A.2d at 251, n. 9.[1]

[1]The state court and its factfinding agency disagreed on the scope of DR1-102(A)(5), which the court held to be "a general rule that is purposely broad to encompass derelictions of ... the responsibility of an attorney as an officer of the court (D.C. App. R. XI, Sec.2)," 496 A.2d at 255.

In response to the district court order to show cause, petitioner took issue with the state court's factfinding in three of the four[2] instances.

In the first, Disciplinary #448-80, 496 A.2d at 251-252, petitioner demonstrated that opposing counsel prepared unnecessarily for a trial rescheduled from May 12, 1981 because, as she testified before the state court, she was absent from her office from May 7, 1981, when petitioner's continuance request was granted, and failed to receive actual notice of the continued date, not because petitioner intentionally had "his opponent

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[2]The state court miscounted the number of instances. There were four, not five. Petitioner took no issue with the findings and conclusions in Disciplinary #55-81, 496 A.2d at 255-256, which involved brief delay in resumption of a trial, not an act or omission indicating want of character essential for federal practice, Ex parte Tillinghast, 29 U.S. 108, 7 L.Ed 798 (1830).

... prepare and appear with witnesses for a trial which had been continued," 496 A.2d at 252.

In the second, Disciplinary #49-81, 496 A.2d at 255, petitioner demonstrated that his reading from the prosecutor's case file was innocuous as the prosecutor already had decided to dismiss the case.

In the fourth, Disciplinary #168-81, 496 A.2d at 257-260, petitioner demonstrated that the state court found both that opposing counsel was "informed that [petitioner] had filed a motion for continuance," 496 A.2d at 258, and that petitioner "failed to notify opposing counsel adequately prior to seeking a continuance," Id, and asserted that the state court was unreasonable in demanding "adequate" notice under its "purposely broad" construction of DR1-102(A)(5).

The district court's committee on

grievances recommended reciprocal discipline without addressing any of petitioner's demonstrations and contended that his argument that the disciplinary rules applied were vague and overbroad was "conclusionary" and not worth hearing. The district court imposed reciprocal discipline summarily, making no findings on petitioner's demonstrations and stating no reasons for rejecting them.

Petitioner appealed the reciprocal discipline order, arguing that the district court was obliged to make findings on the issues of unnacceptable proof and grave injustice he raised under Rule 4-3(II)(d). The court of appeals affirmed, insisting it could "find no error" in the summary disposition of petitioner's claims.

The court of appeals ruled that petitioner failed to show that the "contradictory findings," p. 6A infra, of

the state court were unsupported on the record, and he therefore made no claim of any infirmity of proof whatsoever. As to petitioner's claim of vague and overbroad construction of DR1-102(A)(5), the court of appeals ruled that the authority of In re Bithoney, 486 F.2d 319 (CA1 1974), sanctioned the application of vague rules "when placed in context," Id. at 324 and, further, that petitioner's conduct was such that "all responsible attorneys would recognize as improper," In re Ruffalo, 390 U.S. 544, 555, 88 S.Ct 1222, 1227 (1968), because the state court's hearing committee, disciplinary board, the state court itself, and the district court all had determined that it was such, p.10A infra. Finally, the court of appeals ruled that the district court was not required to make specific findings on the issues petitioner raised in his response to the

order to show cause because "Rule 4-3(II)(d) does not require the district court to retry the facts of the underlying disciplinary case," p. 13A infra.

The court of appeals filed its judgment and accompanying memorandum of affirmance on November 30, 1987. It neglected to inform petitioner of its judgment or to send him a copy, and he learned of it only in February 1988, when he received a copy of a letter from the clerk of the court of appeals to the clerk of the district court transmitting a certified copy in lieu of mandate. Even then, petitioner had to contact the clerk and request a copy of the judgment with memorandum. Because the deadline for filing a rehearing petition already had passed, petitioner could apply only here for further review.

ARGUMENT

The court of appeals stated that Rule 4-3(II)(d) required reciprocal discipline unless petitioner demonstrated or the district court found any of the conditions that prevent it under Selling v Radford, 243 U.S. 46, 37 S.Ct. 377 (1917). But although petitioner demonstrated such conditions, the district court imposed reciprocal discipline without findings on the issues raised by his demonstrations, and the court of appeals affirmed, ostensibly on the authority of Bithoney, supra, condoning the district court's default under Rule 4-3(II)(d). The court of appeals imposed an impossibly and unfairly "heavy burden," p. 5 infra, on appellant under Rule 4-3(II)(d), and its judgment, an obvious injustice, should be vacated summarily.

1. Petitioner was denied fair notice and due process in state disciplinary action.

The state court's factfinding in the disciplinary action against petitioner was obviously inaccurate and therefore "infirm" in terms Selling v Radford, supra. The court of appeals conceded that the state court findings were "contradictory" or inconsistent.

Apart from the infirmity of the state court's findings, the action against appellant was tainted by the state court's application of an unfairly vague and overbroad construction of the disciplinary rule proscribing "conduct prejudicial to the administration of justice," which the state court had defined as "activities which may help a tribunal reach an incorrect decision," In re Keiler, 380 A.2d 119, 125 (D.C. 1977), or "conduct which taints the decision making process," Id.

None of petitioner's acts or omissions fit this definition, and he had no notice that he would be judged according to a "purposely broad" rule with no defined terms at all.

Petitioner raised these issues squarely under Rule 4-3(II)(d)(2), and he was entitled to due process in specific rulings by the district court and review of those rulings by the court of appeals.

2. Petitioner was denied due process in federal reciprocal disciplinary action.

The court of appeals held that "contradictory findings" were sufficient to support the conclusion of the state court and that the district court could, consistent with its duty not to impose discipline unless so constrained by the principles of right and justice, accept such findings as reliable. It was not enough for petitioner to show that the state court contradicted itself in its

findings; he had to show no record support at all for the findings, according to the court of appeals. Under this test, no attorney can prevent reciprocal discipline by raising the issue of "infirmity of proof."

The court of appeals cited Bithoney, supra, as authority for validating a rule vague on its face by placing it "in context." In Bithoney, however, the attorney had fair notice of what was proscribed:

> ...we directly and specifically warned respondent that continued abuse of our process by the filing of immigration appeals solely for the purpose of achieving delay in deportation orders would constitute improper conduct on his part. In continuing this course of conduct by filing six more petitions for review respondent ran afoul not only of the general proscriptions of F.R.A.P. 46 but of our warning to him. Mr. Bithoney did not have to guess as to the conduct which would lead to sanctions against him; that unfairness which is the essence of the vagueness doctrine did not occur in his case.

Id. at 324. In petitioner's case, "that unfairness which is the essence of the vagueness doctrine is manifest. His conduct could not have led any tribunal to reach an incorrect decision, nor could it have tainted any decision making process. He had no warning or notice, direct, indirect, specific, or generic, that his conduct would be adjudged to be prejudicial to the administration of justice as defined in Keiler by the state court that took disciplinary action against him.

Without the benefit of district court findings and specific rulings on petitioner's issues, the court of appeals held that reasonable attorneys all would agree that petitioner's conduct was improper because the state court and its agencies and the district court all had agreed on that question. This holding ignores the disagreement within the state

court itself on the application of DR1-102(A)(5) and credits the district court with an informed, independent judgment not apparent on the record.

The court of appeals condoned the district court's factfinding default on the ground that it was not required to retry the facts of the underlying state disciplinary case. Petitioner never asserted such a requirement, only a duty to make rulings on his Rule 4-3(II)(d) issues. Judgments under Rule 4-3(II), like all others, necessarily include findings and conclusions, Lambos v Young, 79 U.S. App. D.C. 247, 249, 145 F.2d 341, 343 (1944), and the court of appeals engages in regrettable sophistry in stating that the district court must make specific findings "only when it is acting as trier of fact," p.14A infra. Trial courts always act, or should act, as triers of fact on the issues before them.

3. The injustice of this reciprocal discipline should be rectified summarily.

It is clear that the state disciplinary action against petitioner is an unreliable basis for reciprocal discipline. The district court defaulted in its duty to test the reliability of the state action by resolving the issues petitioner raised under Rule 4-3(II)(d), as other courts have done, cf. Disciplinary Proceedings of Phelps, 637 F.2d 171, 174 (CA10 1981), in fidelity to the precedents of Selling v Radford, supra, and Ruffalo, supra. Because of the obvious importance of the determination of who is fit to practice in federal courts and because of the clear injustice, departure from precedent, and default of the lower courts in their duty to make and review an informed, independent, express judgment, petitioner submits that this case need not stand for

briefing and oral argument but that summary disposition on the merits is appropriate.[3]

CONCLUSIONS

The judgment of the court of appeals should be vacated summarily, and this case should be remanded to the district court for findings and conclusions on the issues petitioner raised under Rule 4-3(II)(d) to prevent reciprocal discipline based on the action reported in Matter of Alexander, supra.

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[3]So many violations of petitioner's due process rights are obvious in this case that space cannot permit discussion of the issue of racial prejudice motivating the state action against him, an issue ignored by the state court and lower federal courts, even though squarely raised.

APPENDIX

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 86-5299 September Term, 1987
AGD No. 85-11

In the Matter of

Harry Toussaint Alexander,
Respondent, A Member of the
Bar of the United States
District Court for the
District of Columbia,

Filed Nov 30 1987

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEFORE: Wald, Chief Judge; Edwards and Mikva, Circuit Judges

JUDGMENT

This case was considered on the record on appeal from an order of the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by the court that the district court's order of suspension be affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

No. 86-5299 - In the Matter of Harry Toussaint Alexander

MEMORANDUM

Appellant Harry Toussaint Alexander has appealed an order of the district court suspending him from the practice of law before that court for a period of two years. We find no error and affirm.

After four evidentiary hearings before a hearing committee of the District of Columbia Court of Appeals Board on Professional Responsibility (the "Board"), and subsequent hearings before the Board itself and the District of Columbia Court of Appeals ("DCCA"), the DCCA suspended appellant from practicing law in the District of Columbia courts for two years. In re Alexander, 496 A.2d 244, 244-247 (D.C. 1985. Acting pursuant to its local Rule 4-3(II), which provided for reciprocal discipline of attorneys who had been disciplined by a court of any other United

States jurisdiction, the district court issued an order suspending Alexander from practice before that court for the same period. Record Excerpt No. 4.

Under Rule 4-3(II), which essentially codifies the standard enunciated by the Supreme Court in Selling v Radford, 243 U.S. 46 (1917), upon being notified of the DCCA's suspension order the district court was required to impose the identical discipline unless it found that

> upon the face of the record on which the discipline in another jurisdiction is predicated it clearly appears:
>
> (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject; or

> (3) that the imposition of the same discipline by this court would result in grave injustice; or
>
> (4) that the misconduct established is deemed by this court to warrant substantially different discipline.

Local Rule 4-3(II)(d). In order to avoid reciprocal discipline, then, appellant must bear a heavy burden: he must not only prove that one of the conditions in Rule 4-3(II)(d) exists but that it "clearly appears" upon "the face of the record" on which the DCCA discipline was predicated.

With respect to the first condition, appellant does not claim that the procedure followed in the DCCA was lacking in notice or opportunity to be heard. He was apparently able to present evidence and cross examine witnesses at each of the four hearings held by the hearing committee. He was then given the opportunity to present

his case before the Board, 496 A.2d at 246, and again before the DCCA, Id. at 244.

Appellant does argue that there was "unacceptable proof." Brief for Appellant at 11; Appellant's Reply Brief at 9-11. By asserting "unacceptable proof" he evidently intends to claim that under Rule 4-3(II)(d)(2) "there was such an infirmity of proof establishing the misconduct" in the proceeding before the DCCA "as to give rise to the clear conviction" that the district court "could not, consistent with its duty, accept as final the conclusion on that subject." He does not, however, make any claims that would establish any infirmity of proof whatsoever.

In his brief Mr. Alexander takes issue with some of the DCCA's findings, Appellant's Reply Brief at 9, but fails to show that the contradictory findings of the

Board and of the DCCA are unsupported on the record. To support his claim of "unacceptable proof," he primarily argues that his actions should not have been viewed as misconduct: he denies that "he limited his representation unreasonably," Id., that "his reading from an opposing counsel's case file was ground for discipline as unethical," Id., and that "he limited his participation in his client's case," Id. at 10. He also contends that "his conduct could not have affected the administration of justice," Brief for Appellant at 13. He fails to demonstrate, however, that there was any lack of proof establishing the events that the hearing committee, the Board, and the DCCA all viewed as misconduct.

Under his claim of unacceptable proof, appellant also makes two arguments that

would appear to amount to claims that the imposition of reciprocal discipline by the district court "would result in grave injustice" under Rule 4-3(II)(d)(3). First, he argues that the DCCA has construed its disciplinary rules in an impermissibly vague manner as applied to the facts in this case. Appellant's Reply Brief at 10; Brief for Appellant at 13. Evidently, his claim is that he was "held ... responsible for conduct which he could not reasonably understand to be proscribed." United States v Hariss, 347 U.S. 612, 617 (1954).

In In re Bithoney, 486 F.2d 319, 324 (1st Cir. 1974), the First Circuit rejected a vagueness challenge to a rule forbidding "conduct unbecoming a member of the bar." The court stated that

> when placed in context, as part of a rule directed to a discrete professional group, the terms take

> on definiteness and clarity. The legal profession has developed over a considerable period of time a complex code of behavior and it is to that code that such terms as "conduct unbecoming a member of the bar" refer.

Justice White, in his concurrence in In re Ruffalo, 390 U.S. 544 (1968), also discussed the standard requiring disbarment for "conduct unbecoming a member of the bar." He noted that

> even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct ... includes conduct which all responsible attorneys would recognize as improper for a member of the profession.

Id. at 555.

Appellant argues that "responsible attorneys [would] differ in appraising the propriety" of his conduct, Id. at 556, and that therefore the disciplinary rules as

applied to this case are impermissibly vague. We disagree. The Board's hearing committee, the Board itself, the DCCA, and the district court all determined that appellant's conduct in various matters was improper. After reviewing the record, we agree with the conclusion reached by the Committee on Grievances:

> Failing to pursue cases filed on behalf of clients, declining to prepare or present arguments on the merits when continuances are denied, delaying for three months to take any action on a matter when the client's position is already clearly in jeopardy due to delay, failing to make scheduled appearances in court, representing that opposing counsel has consented to motions for continuance when opposing counsel in fact is opposed to further delay, and attempting to read from the confidential case files of opposing counsel are all courses of conduct that any reasonable attorney would not only eschew but condemn.

Brief for Appellee at 20.

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Appellant's final argument is that the district court was obligated to make formal findings or otherwise state on the record its reasons for rejecting appellant's criticisms of the proceedings of the DCCA and that the court's failure to do so is equivalent to a failure to consider his arguments. The district court did not attach a memorandum to its order of suspension but in the order simply stated:

> The court has carefully considered the respondent's answer to the Order to Show Cause and exhibits attached thereto, the Committee on Grievance's Reply thereto, and the entire record herein and finds that none of the defenses raised by the respondent herein has merit sufficient to bar the imposition of reciprocal discipline and that none of the defenses provided by Rule 4-3(II)(d) of this court appears on the face of the record herein.

Appellant asserts that "in any contested reciprocal disciplinary case, findings of

fact are necessary for due process" and that the district court's statement that none of the defenses he raised "has merit sufficient to bar the imposition of reciprocal discipline" cannot be considered such a finding. Brief for Appellant at 16. Citing In re Thies, 662 F.2d 771 (D.C. Cir. 1980), appellant suggests that "a bare statement that the IRule 4-3(II)(d)I criteria were satisfied" is insufficient to support the imposition of reciprocal discipline by the district court. The issue in Thies, however, was whether the federal court could impose reciprocal discipline on an attorney by making a "bare statement" that the Rule 4-3(II) criteria were satisfied when the state court that had originally disciplined the attorney failed to provide him the opportunity for a hearing. Under Rule 4-3(II), the district

court is not to impose reciprocal discipline if the attorney was not granted a hearing by the state court. The holding in Thies, therefore, is that a bare statement that the Rule 4-3(II) criteria are satisfied is insufficient when in fact they are not; the holding is not that such a statement is never sufficient.

Appellant contends that Rules 52(a) and 41(b) of the Federal Rules of Civil Procedure also require the district court to make specific findings on the issues he raised in his answer to the order to show cause. Appellant's Reply Brief at 6-8. Rule 52(a), however, applies only to "actions tried upon the facts without a jury or with an advisory jury." Rule 4-3(II)(d) does not require the district court to retry the facts of the underlying state disciplinary case but only to determine whether the

conditions set forth in the Rule appear "upon the face of the record" of the state proceeding. Rule 41(b) is equally inapplicable because it requires the district court to make specific findings only when it is acting as the trier of fact.

Under the circumstances of this case, we find sufficient the district court's statement that it "carefully considered" the record and briefs and found that none of the defenses raised by appellant "has merit sufficient to bar the imposition of reciprocal discipline" under Rule 4-3(II). Because we find no error on the part of the district court, the order of suspension is affirmed.